

STATE OF CONNECTICUT
DEPARTMENT OF PUBLIC HEALTH

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IN RE: *
DECLARATORY RULING *
PROCEDURE ON THE *
INTERPRETATION AND *
APPLICABILITY OF VARIOUS *
STATUTES AND REGULATIONS *
CONCERNING THE SALE OF *
CONTACT LENSES *

JUNE 12, 2002

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CONNECTICUT BOARD OF EXAMINERS FOR OPTICIANS

BEFORE: RAYMOND DENNIS, LO, CHAIRPERSON
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ALBERT WINNICK, LO, MEMBER

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1 . . .Verbatim Proceedings of a Declaratory
2 Ruling Proceeding on the Interpretation and Applicability
3 of Various Statutes and Regulations Concerning the Sale
4 of Contact Lenses, before the State of Connecticut, Board
5 of Examiners for Opticians, held at the Legislative
6 Office Building, 410 Capitol Avenue, Hartford,
7 Connecticut, on June 12, 2002, at 9:10 A.M., at which
8 time the parties were represented as hereinbefore set
9 forth . . .

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14 CHAIRPERSON RAYMOND DENNIS: My name is
15 Raymond Dennis. I'm Chairman of the Board of Examiners
16 for Opticians. I'd like to introduce the other members
17 of our Board first.

18 To my immediate left, Ann Tosca, our
19 public member. To her left, Al Winnick, a professional
20 members. To my right, representing us today the
21 Assistant Attorney General Eileen Meskill.

22 I'm just going to make a brief statement
23 to get started and then we'll get on with the
24 proceedings. We're here this morning to conduct a

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1 the Federal Trade Commission.

2 I'd like to start with the swearing in
3 please.

4 (Whereupon, Mr. R. Ted Cruz was duly sworn
5 by the Court Reporter.)

6 COURT REPORTER: Would you state and spell
7 your name for the record please?

8 MR. CRUZ: My name is Ted Cruz, C-r-u-z,
9 T-e-d. And I'm the Director of the Office of Policy
10 Planning at the Federal Trade Commission. With me is
11 Jerry Ellig, who is the Deputy Director of the Office of
12 Policy Planning and PhD economist who is also available
13 and was one of the co-authors of the FTC report here.

14 The testimony we are providing today and
15 the written testimony that the FTC provided to this Board
16 is the statement of the staff of the Office of Policy
17 Planning and the staff of the Bureau of Consumer
18 Protection.

19 Staff comments are something that the FTC
20 does in a wide number of areas and it's how we typically
21 comment on proceedings in state and local matters. And
22 those comments are the official position adopted by the
23 Office of Policy Planning, which is an office that has
24 policy overview for the entire agency of the FTC, and

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1 they are they position of the Bureau of Consumer
2 Protection, which again has responsibility for consumer
3 protection across the agency.

4 In addition, the comments were approved by
5 the full Commission. The written comments that we
6 submitted to you in March were approved by a four-to-
7 nothing vote, unanimous vote of the Commission. One
8 Commissioner was unavailable for that vote.

9 And my testimony and Dr. Ellig's testimony
10 before you today was approved unanimously, five-zero,
11 with the Commission authorizing us to come and provide
12 this oral testimony.

13 Rather than summarize what we said in
14 writing, which I believe lays out the position of the
15 staff of the Federal Trade Commission in considerable
16 detail, what I'd like to do is just really hit the high
17 points of what we think is important for this Board to
18 consider.

19 And I'd like to begin by observing just a
20 big question; why we're here. Why is the FTC coming
21 before your Board and devoting substantial staff and
22 Commission resources to sharing our opinions with this
23 Board?

24 And the reason that the FTC felt it made

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1 sense to come in here and provide that advice is that the
2 staff are concerned that the potential rulings in this
3 proceeding could have a significant impact on Connecticut
4 consumers. And the FTC's statutory mission is to protect
5 consumers, to protect consumers in Connecticut and to
6 protect consumers nationwide. And our statutory mission
7 is also to preserve competition.

8 There is a concern on the part of the
9 staff of the FTC that the rulings of this Board,
10 particularly if those rulings were then followed by
11 boards of other states, could have a significant and
12 detrimental impact nationwide to consumers and
13 competition. And it was that concern that led the
14 Commission and the staff to come before you today.

15 In addition, the Commission has extensive
16 experience in the eye care industry. The Commission has
17 been very active in the eye care industry for a number of
18 decades and there's a great deal of institutional
19 experience both in attorneys and economists at the
20 Federal Trade Commission.

21 In large part, much of this dispute before
22 you today that we've seen hashed out in the Discovery
23 disputes and everything else it seems to us is part and
24 parcel of a larger dispute and a dispute principally

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1 between private parties, two private parties in
2 particular, Johnson & Johnson and 1-800 Contacts, that
3 have been engaged in a rather lengthy and at times rather
4 acrimonious dispute.

5 The suggestion of the staff of the FTC is
6 that this Board would best serve Connecticut consumers by
7 leaving that dispute to those parties and letting them
8 fight it out between each other and to act upon the
9 petition here by ruling that Connecticut Statutes and
10 Regulations require licensing and require prescriptions
11 and, in particular, depending on how prescriptions are
12 required -- and I'll explain that a little bit more in a
13 moment. It is the position of the staff and the FTC that
14 that could have significant to detrimental impact on
15 Connecticut's consumers.

16 Now, I want to clarify that the FTC does
17 not have a position on the proper interpretation of
18 Connecticut Statutes and Regulations. It is not our role
19 or, frankly, our competence to come before you and argue
20 what a particular Connecticut Statute or Regulation
21 means. That is a role much better entrusted by statute
22 to this Board and much better suited to the Attorney
23 General's Office and to the private parties who are here
24 litigating that matter.

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1 Rather, what the Commission is doing is
2 recognizing that when any regulatory board is addressing
3 statutory matters and regulatory matters, there is often
4 a considerable amount of discretion in how statutes and
5 regulations are applied.

6 And in applying that discretion, this
7 Board is entitled to consider the public interest. And
8 so the purpose of our comment is to comment on the public
9 interest and what the likely impact of a ruling by this
10 Board will be upon Connecticut consumers.

11 We'd like to make three general points.
12 First, the current regulation, in the judgment of the
13 staff of the Federal Trade Commission, is sufficient to
14 deal with the public health concerns that are raised by
15 the sale of contact lenses.

16 A great deal of material has been
17 submitted to this Board about the health risks that can
18 accompany the use of contact lenses. But there are a
19 number of things that are not before this Board but
20 nonetheless are being discussed in the abstract.

21 Nothing before this Board would affect
22 quality standards for the manufacture of contact lenses.

23 Nothing before this Board would reflect -- or affect
24 standards of use, when contacts are worn, for how long,

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1 under what conditions. Nothing before this Board would
2 affect standards of medical examinations, when
3 optometrists or ophthalmologists would prescribe
4 contacts, what contacts they would prescribe. And
5 nothing before this Board would affect fraud or deception
6 in the sale or delivery of contact lenses.

7 For all of those, there are extensive
8 regulatory protections, such that if a seller of contact
9 lenses, for example, were engaged in fraud or misleading
10 representations to consumers, I am sure the Connecticut
11 Attorney General's Office would take that very seriously.

12 And I can tell you that the Federal Trade Commission
13 would as well, given that our statutory mission is to
14 protect consumers and, in particular, to protect them
15 from fraud and deception.

16 The question before this Board is really a
17 lot more narrow and it involves a sub-set principally
18 which is stand-alone sellers of replacement lenses,
19 which, as we explained in our written comment, is a more
20 recent development in the evolution of the eye care
21 world, such that many of the tasks that one thinks of an
22 optician carrying out are not carried out by stand-alone
23 sellers of replacement lenses.

24 Opticians are highly trained

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1 professionals. A stand-alone seller of replacement
2 lenses is taking sealed boxes off a shelf in a warehouse
3 and dropping them in a FedEx packet.

4 And the question before this Board with
5 respect to licensing is if that task, taking a sealed box
6 from a shelf and dropping it in the FedEx package, if
7 that task needs to be supervised by a Connecticut
8 optician; if a professionally trained optician needs to
9 stand and supervise, either directly or indirectly, the
10 taking of that sealed package and moving it into a
11 mailing package. And as we have suggested in our
12 comment, we do not believe the answer to that should be
13 Yes.

14 A second point I'd like to address very
15 briefly -- and Jerry Ellig is available to address it in
16 considerable more length -- is in deciding whether to
17 require licensing part of that decision should measure
18 the benefits of licensing to the incremental costs. And
19 it is the judgment of the staff of the Federal Trade
20 Commission that the likely costs to Connecticut
21 consumers, to consumers nationwide if these regulations
22 are replicated in other boards following your example,
23 and to competition are all likely to be significant and
24 that the benefits of requiring licensing are not likely

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1 to be significant. And, as I've said, Jerry Ellig is
2 available when I'm completed to elaborate on that point.

3 I also want to address a matter of
4 clarification. In the briefs, Johnson & Johnson
5 represented that the Federal Trade Commission confirmed
6 that their view that the commerce clause is not an
7 obstacle to applying licensing beyond the borders of the
8 state of Connecticut. And to clarify the record, that is
9 not correct. The staff of the Federal Trade Commission
10 did not confirm anything to that effect.

11 And we have brought with us today in
12 writing a clarification, a letter to this Board making
13 clear that our brief did not state that. And I have that
14 available for the Board here today, as well as copies for
15 the parties.

16 MS. ZWISLER: I would object to him
17 handing this out on this -- on no notice at all to me and
18 it would be impossible for me to effectively cross
19 examine on this because I guarantee to you that it is a
20 reversal of what they said in the brief. And I'm going
21 to need time to read that and read the brief and
22 demonstrate to you that that's so. If you'd like to
23 accept it, that's fine. But then I need to defer my
24 Cross Examination of this witness to prepare for this

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1 reversal.

2 MR. CRUZ: I would note that this letter
3 is a four-paragraph letter that simply states that was
4 not our position. And it responds to the position
5 Johnson & Johnson took in its reply brief long after the
6 submission of our brief. And it simply clarifies that
7 they have mischaracterized our position and we do not
8 take the position they ascribe to it.

9 I think upon seeing the letter, I'm quite
10 confident that Ms. Zwisler can cross examine as much as
11 she likes to the statement that that is not our position.
12 And the letter simply makes that clear.

13 MS. ZWISLER: Written testimony needs to
14 be submitted seven days before this hearing. And I think
15 it's completely improper and I object.

16 In addition to my objection that I don't
17 have on the fly the ability to read the document and
18 listen to him talk and then cross examine him, I think
19 that's terrifically unfair.

20 MR. RUBENSTEIN: Maybe we should take a
21 break and have Ms. Zwisler read the letter.

22 MS. MESKILL: Well, I do think you
23 obviously have to give her a copy of the letter. I'd
24 like to know -- I think we will take a break. But before

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1 we do that, I'd like to know if you know what page of the
2 brief, so I can go back and look at it, to what you're
3 talking about.

4 MR. CRUZ: That's Page 18 of the reply
5 brief, which the opening paragraph -- the opening
6 paragraph is a letter, cites --

7 MS. MESKILL: Okay. Thank you. Of the
8 original brief?

9 MR. CRUZ: Of the reply brief.

10 MS. MESKILL: Of the reply brief.

11 CHAIRPERSON DENNIS: I have five minutes
12 after 2:00. At 2:15, we'll reconvene.

13 (RECESS)

14 CHAIRPERSON DENNIS: Okay. Since we have
15 in our break had the opportunity to, at the very least,
16 allow some opportunity for you to review the document
17 provided by the FTC, I'd like to ask you if you want to
18 restate your objection or --

19 MS. ZWISLER: No. Thank you for the
20 break. That's permitted me to read the letter and to
21 find where it's inconsistent with the report. And I'll
22 deal with that on Cross Examination.

23 CHAIRPERSON DENNIS: Okay. Fine. So
24 you're no longer objecting to the admittance of this

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1 document. Is that correct?

2 MS. ZWISLER: That's correct, Mr.
3 Chairman.

4 CHAIRPERSON DENNIS: Then that means that
5 we all get a copy of it. Is that correct?

6 MS. MESKILL: Okay. Right. Let me just
7 find -- they are Intervenor 2. This will now be I-2-B.
8 And that's the letter dated June 11, 2002.

9 (Whereupon, the FTC letter dated June 11,
10 2002 was received and marked into evidence as Intervenor
11 2 Exhibit B.)

12 MS. MESKILL: I'm sorry. I just put the
13 mike back on. That will be I-2-B.

14 CHAIRPERSON DENNIS: Okay. And, again --
15 and I did have this conversation briefly with you, sir,
16 regarding the ten-minute time limit we gave for
17 statements. And I think we're at about two minutes left
18 here. So if you'd be kind enough to sum up your --

19 MR. CRUZ: Sure. I will wrap up with my
20 final point, which is on the third question before this
21 Board, concerning a prescription requirement. The staff
22 of the Federal Trade Commission takes no position on the
23 existence or not of a Federal or Connecticut State
24 prescription requirement or on, if there is such a

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1 requirement, when it is implicated and when it is not.

2 What we do take a position on is if this
3 Board determines that there is a Connecticut prescription
4 requirement, that there is a substantial amount of
5 difference in how any such prescription requirement is
6 interpreted. And the way a prescription requirement is
7 interpreted can either have pro-competitive or anti-
8 competitive effects. And, in particular, the way the
9 requirement that a seller selling contact lenses receive
10 a prescription is interpreted can be interpreted either
11 pro-competitively or anti-competitively.

12 Johnson & Johnson has already backed away
13 from their initial petition where they suggested that a
14 prescription must be an original in writing, signed by a
15 physician or optometrist to -- which would be the least
16 pro-competitive interpretation of what receipt of
17 prescription means.

18 They have now moved to receipt of a
19 written prescription or verification with the individual
20 that issued the prescription.

21 We would point out that beyond that there
22 are additional ways that a prescription requirement could
23 be interpreted that include accepting the representations
24 of a customer, which this Board could determine is

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1 sufficient to qualify as receipt of a prescription, or,
2 as we suggested in our comment, this Board could
3 determine -- could presume that receipt of information
4 from the customer, along with providing the issuing
5 optometrist an opportunity to correct any errors, is
6 sufficient.

7 I would note that a number of the filings
8 talked about the particular practices of 1-800 and others
9 and said that some of the calls asking for verification
10 don't include the name of the customer, don't include a
11 number back. The staff of the FTC doesn't know what 1-
12 800's business practices are. But that's certainly a
13 legitimate inquiry whether there is a reasonable
14 mechanism for verification.

15 But, that being said, particularly given
16 the significant possibility that the individual
17 optometrist might refuse to affirmatively confirm, it
18 would be a reasonable determination for this Board to
19 make that a prescription can be presumed received if the
20 customer gives that information to the seller and the
21 seller contacts the issuing optometrist and gives a
22 reasonable opportunity to correct any errors.

23 Finally, what we would say is that in
24 interpreting your statutes and regulations there is

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1 frequently a great deal of leeway. And the staff of the
2 Federal Trade Commission would urge this Board in
3 considering that leeway and in exercising its discretion
4 to consider the welfare of Connecticut consumers and
5 maximizing that welfare and maximizing competition so
6 that consumers can receive high-quality goods at low
7 prices with the least convenience. And so consumer
8 choice and competition can be respected.

9 Thank you.

10 CHAIRPERSON DENNIS: Thank you.

11 And we'll start with Cross Examination
12 with Johnson & Johnson.

13 MS. ZWISLER: Thank you.

14
15 R. TED CRUZ

16 having been called as a witness, having been duly sworn,
17 testified on his oath as follows:

18
19 CROSS EXAMINATION

20 BY MS. ZWISLER:

21 Q Mr. Cruz, your opinion, basically, or your
22 testimony to the Board is that the FTC believes that if
23 the Board interprets its laws restrictively, there is
24 likely to be a significant adverse effect. Is that what